

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

JEREMY POWELL,

Plaintiff,

v.

CITY OF ELKO, *et al.*,

Defendants.

Case No. 3:21-cv-00418-ART-CSD

ORDER

Pro se Plaintiff Jeremy Powell brings this action under 42 U.S.C. § 1983 against Defendants Bartolo Ortiz, Brenton Pepper, Sgt. Hood, Rosina Garcia, Joanna Contreras, and John Adkins (collectively, “Defendants”), alleging that various Defendants used excessive force in arresting him and failed to provide necessary medical care, resulting in permanent disfigurement of his thumb. (ECF No. 6 at 7, 13, 17-23.)

Before the Court is an Objection (ECF No. 114) by Plaintiff, to an Order (ECF No. 108) by Magistrate Judge Craig S. Denney, denying Plaintiff’s Fifth Motion for Appointment of Counsel (ECF No. 87).

I. LEGAL STANDARD

Under LR IB 3–1, 28 U.S.C. § 636(b) and Rule 72, the Court may reconsider a magistrate judge’s pre-trial order where the order is timely objected to and clearly erroneous or contrary to law. The Court often reviews objections to magistrate judges’ orders *de novo*. See *United States v. Reyna-Tapia*, 328 F.3d 1114, 1116 (9th Cir. 2003) (“De novo review of the magistrate judges’ findings

1 and recommendations is required if, but *only* if, one or both parties file objections
 2 to the findings and recommendations.”) (emphasis in original). But “[w]hen a
 3 magistrate judge rules on a non-dispositive matter, a district judge may
 4 ‘reconsider’ that ruling only if it is ‘clearly erroneous or contrary to law.’” CPC
 5 Pat. Techs. Pty Ltd. v. Apple, Inc., 34 F.4th 801, 804 (9th Cir. 2022) (citing 28
 6 U.S.C. § 636(b)(1)(A); Fed. R. Civ. P. 72(a)). As a motion for appointment of
 7 counsel does not appear in the enumerated list of dispositive motions in 28
 8 U.S.C. § 636(b)(1)(A), it is non-dispositive. *See also* LR IB 1-4. Thus, we review
 9 Judge Denney’s Report and Recommendation under a “clear error” standard.

11 Generally, a person has no right to counsel in civil actions. *Palmer v. Valdez*,
 12 560 F.3d 965, 970 (9th Cir. 2009) (citing *Storseth v. Spellman*, 654 F.2d 1349,
 13 1353 (9th Cir. 1981)). The Court may only appoint counsel for a party proceeding
 14 *in forma pauperis* in exceptional circumstances. 28 U.S.C. § 1915(e)(1). *Tilei v.*
 15 *California Department of Corrections and Rehabilitation*, 644 Fed.Appx. 758, 759
 16 (9th Cir. 2016) (citing *Terrell v. Brewer*, 935 F.2d 1015, 1017 (9th Cir. 1991)). In
 17 order to determine whether exceptional circumstances exist, the Court must
 18 consider “the likelihood of success on the merits as well as the ability of the
 19 petitioner to articulate his arguments *pro se* in light of the complexity of the legal
 20 issues involved.” *Palmer*, 560 F.3d at 970 (citation omitted). Neither of these
 21 considerations is dispositive and the Court must examine them together. *Id.*
 22 (citing *Wilborn v. Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986)).

23 **II. ANALYSIS**


26 Mr. Powell objected (ECF No. 114) to an order denying his fifth motion for the
 27 appointment of counsel (ECF Nos. 108, 87). In his order, Judge Denney found
 28

1 that Mr. Powell's claims were not sufficiently complex to warrant the
2 appointment of counsel, and Mr. Powell was sufficiently able to articulate his
3 claims but had not shown a likelihood of success on the merits. In his objection,
4 Mr. Powell argued that exceptional circumstances exist based on the alleged
5 attempts by prison officials to manipulate and destroy evidence, the difficulties
6 of litigating with an injured hand, and his inability understand what must be
7 pled to show a likelihood of success on the merits. (ECF No. 114 at 3-5.)

9 The Court finds that Judge Denney's denial of Mr. Powell's fifth Motion for
10 Appointment of Counsel was not clearly erroneous or contrary to law. Judge
11 Denney applied the correct legal standard for appointing of counsel and, in light
12 of the discretionary nature of that decision, did not clearly err in concluding that
13 there are no exceptional circumstances warranting the appointment of counsel
14 at the time of his decision. Mr. Powell has shown that he is able to articulate his
15 claims and present legal arguments, despite the hardships of being detained and
16 having an injured dominant hand. Though the Court takes no view on Mr.
17 Powell's likelihood of success on the merits, it finds that Judge Denney did not
18 clearly err in denying Mr. Powell's fifth request for appointment of counsel.
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21 This order is without prejudice. After filing his objection, Mr. Powell was
22 transferred to a prison in Utah with extremely limited access to legal materials
23 and resources, including postage. (ECF No. 137 at 2-5.) More recently, Mr. Powell
24 was paroled to a community correction center. (ECF No. 163.) It is unclear from
25 the record whether Mr. Powell now has access to legal resources and portions of
26 his file and discovery that he needs to litigate this case.
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It is therefore **ORDERED** that Plaintiff's Objection (ECF No. 114) to Magistrate Judge Deney's Order denying the appointment of counsel to Plaintiff (ECF No. 108) is **OVERRULED**.


ANNE R. TRAUM
UNITED STATES DISTRICT JUDGE